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THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Power Designers, LLC

Serial No.76155141

Eric W. Ibele of Neider & Boucher, S.C. for Power
Designers, LLC

Kathleen M. Vanston, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney)

Before Seeherman, Quinn and Walsh, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Power Designers, LLC has appealed from the final
refusal of the Trademark Examining Attorney to register
POWER TRAC as a trademark for a "vehicle battery charge
monitor."¹ Registration has been refused pursuant to
Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on

¹ Application Serial No. 76155141, filed October 30, 2000, based
on Section 1(b) of the Trademark Act (intent-to-use).

the ground that applicant's mark so resembles the mark POWERTRAK, previously registered for "electronic controller and software for monitoring voltage, current and temperature of batteries,"² that, if used on applicant's goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

We affirm the refusal of registration.

Before turning to the substantive issue in this appeal, we note that the Examining Attorney has objected to additional evidence submitted by applicant with its appeal brief because it is untimely. The objection is well taken. Trademark Rule 2.142(d) provides that the record should be complete prior to the filing of an appeal. Accordingly, these additional submissions have not been considered. We add that even if they had been properly made of record, they would have no effect on our decision herein, as the determination of likelihood of confusion must be made on the basis of the goods as they are identified in the application and in the cited registration. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

² Registration No. 2571837, issued May 21, 2002.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's mark is POWER TRAC; the cited mark is POWERTRAK. The marks are obviously identical in pronunciation and connotation. While there are slight differences in appearance, the differences are not sufficient to distinguish the marks. Even though the registrant's mark is depicted without a space, the two words that comprise the mark are readily apparent. And although the last letters of each mark differ, in each mark the term will immediately be recognized as a misspelling of TRACK. Consumers are not likely to note or remember this minor difference in the last letter of the marks; in fact,

to the extent that they are aware that there is a misspelling in the mark, they are likely to misremember whether that misspelling is "TRAC" or "TRAK." Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255 (TTAB 1980). Thus, we find that the marks are similar in appearance, and convey identical commercial impressions. This du Pont factor of the similarity of the marks strongly favors a finding of likelihood of confusion.

The greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion. In re *Concordia International Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). Here, the identification in the cited registration is "electronic controller and software for monitoring voltage, current and temperature of batteries," while applicant's goods are identified as a "vehicle battery charge monitor." Both products, as identified, are monitors, and the battery charge that applicant's goods monitor would necessarily involve the monitoring of voltage and current. Applicant has confirmed this, explaining that

its "POWER TRAC DT and SP Series Battery Data Logger monitors, tracks and logs various battery performance indicia, including voltage, temperature, current, and amp-hours of charge and discharge." Brief, p. 2. As such, its product appears to perform many of the same functions as the registrant's identified goods, which monitor voltage, current and temperature of batteries. Thus, applicant's goods and the registrant's goods are highly similar, if not identical.

Applicant has pointed out that its goods are classified in Class 12, while the cited registration is in Class 9. As the Examining Attorney has explained, the classification of goods and services by the U.S. Patent and Trademark Office is a purely administrative determination and has no bearing on the issue of likelihood of confusion. *National Football League v. Jasper Alliance Corp.*, 16 USPQ2d 1212, n. 5 (TTAB 1990) (The classification system was established for the convenience of the Office rather than to indicate that goods in the same class are necessarily related or that classification in different classes indicates that they are not related).³

³ The Examining Attorney stated in her brief that applicant's goods are properly classified in Class 9, and that the Office erroneously classified them in Class 12. That issue is not before us on appeal, but we note that Examining Attorneys have the discretion, either before or after publication, to amend the

Applicant does not really dispute the similarity of the goods or, more precisely, applicant has not discussed how the goods are different. Rather, its principal argument is that "it does not appear that registrant is currently using the registered mark." Brief, p. 2. This is a collateral attack on the validity of the registration, and it may not be pursued in the context of an ex parte proceeding. See *In re Dixie Restaurants*, supra, and cases cited therein. As the Court pointed out in *Cosmetically Yours, Inc. v. Clairol Inc.*, 424 F.2d 1385, 1387, 165 USPQ 515, 517 (CCPA 1970), "it is not open to an applicant to prove abandonment of [a] registered mark" in an ex parte registration proceeding; thus, the "appellant's argument ... that [a registrant] no longer uses the registered mark ... must be disregarded." Therefore, as long as the registration of registrant's mark remains on the Register, we must accord it the presumptions provided by Section 7(b) of the Statute, and treat it as valid.

Both applicant and the Examining Attorney have limited their arguments to the du Pont factors of the similarity of the marks and the similarity of the goods. Because of

classification of applications by Examiner's Amendment without prior approval by the applicant. Accordingly, if applicant were to appeal our decision and be successful, the Examining Attorney would have the right to issue an Examiner's Amendment prior to the publication of the mark. See TMEP §707.02.

this, and because no evidence has been submitted on other factors, we, too, have limited our discussion to these factors. To the extent that any other factors are applicable, we must treat them as neutral.

Because of the very close similarity of the marks and the similarity of the goods, we find that applicant's use of POWER TRAC for its identified goods is likely to cause confusion with the cited registration for POWERTRAK.

Decision: The refusal of registration is affirmed.